Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

(2)

No. 94-2061

In The

Supreme Court of the United States

October Term, 1995

GARY W. JENKINS,

Petitioner,

v.

AMCHEM PRODUCTS, INC., UNION CARBIDE AGRICULTURAL PRODUCTS CO., RHÔNE-POULENC AG COMPANY, PLATTE CHEMICAL COMPANY, and FARMLAND INDUSTRIES, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

STEPHEN W. JACOBSON
(Counsel of Record)
4400 N. Mulberry Drive
Kansas City, Missouri 64116
(816) 587-0330

DONALD W. BOSTWICK
MONTE VINES
ADAMS, JONES, ROBINSON & MALONE
600 Market Center
155 North Market
Wichita, Kansas 67201
(316) 265-8591

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether this Court should review a decision of the Kansas Supreme Court that, consistent with the decisions of eight federal courts of appeals, narrowly holds that federal law preempts state tort law claims based upon a theory of failure to warn.

II. Whether this Court should review a decision of the Kansas Supreme Court determining, consistent with this Court's Supremacy Clause decisions, that no protected due process interest of petitioner was infringed by preemption of his state tort law claim and, consistent with this Court's decision in *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), that Congress need not provide an alternative remedy.

LIST OF PARTIES

Petitioner, Gary W. Jenkins, is an individual.

Respondent Farmland Industries, Inc. is a Kansas Corporation, and has the following non-wholly owned subsidiaries and affiliates: AG Processing Inc.; Alliance Farms Cooperative Association; Arlington Coop Exchange; B.C.'s Truck Plaza, Inc.; Big Country Feeds Ltd. Liability Co.; Broadcast Partners; Cenex/Farmland, Inc.; The Cooperative Finance Association, Inc.; Dakota Fuels, Inc.; Farm Kan, L.L.C.; Farmhut Company L.L.C.; Farmland Hydro, Inc.; Farmland Hydro, Limited Partnership; Feeder Pig Producers I, Inc.; FII Communications, L.L.C.; Flag, Inc.; Flag, L.P.; FS, Inc.; H F I, A Partnership; Harvest States/Farmland Specialty Feeds; Heartland Grain Fuels, L.P.; Heartland Wheat Growers, Inc.; Heartland Wheat Growers, L.P.; Landmark Nutritional Services, L.P.; LFS Management, Inc.; Liquitech Management Group, Inc.; Liquitech, Ltd.; Market Communications Group, L.L.C.; National Beef Packing Company, L.P.; National Carriers, Inc.; Nebraska Energy Limited Liability Company; Nedi-Farmland G.P., Inc.; Nedi-Farmland, L.P.; North Platte Petroleum Corporation, Inc.; North Platte Petroleum Partners, L.P.; Nufarm USA, Inc.; Penterra, Inc.; Pig Producers I, L.P.; Sandoz Crop Protection L.P.; SF Phosphate Limited Company; Southwest Liquids, LLC; Sugar Creek River Terminal LLC; Thompson's Pet Pasta Products, Inc.; Tire & Oil Distributors, L.C.; Tri-Energy Limited Liability Corporation; Universal Cooperatives, Inc.; Westland Terminal, L.L.C.; and Wilfarm, L.L.C.

LIST OF PARTIES – Continued

Rhône-Poulenc Inc., a New York corporation, is the successor-in-interest by merger to respondent Rhône-Poulenc Ag Company, formerly known as respondent Union Carbide Agricultural Products Company and as respondent Amchem Products, Inc. Rhône-Poulenc Inc. is a wholly owned subsidiary of Rhône-Poulenc S.A. of France.

Respondent Platte Chemical Company is a Nebraska Corporation and is a subsidiary of United Agri Products Inc. which in turn is a subsidiary of ConAgra, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 4

I. THE ISSUE PRESENTED BY THE KANSAS SUPREME COURT'S PREEMPTION DECISION IS NOT OF THE CHARACTER FOR WHICH DISCRETIONARY REVIEW SHOULD BE GRANTED 4

II. REVIEW OF PETITIONER'S DUE PROCESS ARGUMENT SHOULD NOT BE GRANTED, BECAUSE THE KANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH SETTLED LAW AND PETITIONER'S ARGUMENT LACKS MERIT ON ITS FACE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Arkansas Louisiana Gas & Co. v. Hall, 453 U.S. 571 (1981) 7

Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158 (10th Cir.), cert. granted, vacated and remanded, 113 S.Ct. 314 (1992) 5

Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir.), cert. denied, 114 S.Ct. 60 (1993) 5

Bice v. Leslie's Poolmart, Inc., 39 F.3d 887 (8th Cir. 1994) 5

Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992) 4, 5, 6, 7

Davidson v. Velsicol Chemical Corp., 834 P.2d 931 (Nev. 1992), cert. denied, 113 S.Ct. 1944 (1993) 6

Duke Power v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 7, 8

Ferebee v. Chevron Chemical Company, 736 F.2d 1529 (D.C. Cir. 1984) 6

Gade v. National Solid Waste Management Ass'n, 112 S.Ct. 2374 (1992) 4

International Paper v. Ouellette, 479 U.S. 481 (1987) 6

Jenkins v. Amchem Products, Inc., 256 Kan. 602, 886 P.2d 869 (1994) 7, 9

King v. DuPont de Nemours Co., 996 F.2d 1346 (1st Cir.), cert. dismissed, 114 S.Ct. 490 (1993) 5

TABLE OF AUTHORITIES – Continued

Page

MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) 5

Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987) 7

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir.), cert. denied, 114 S.Ct. 300 (1993) 5

Papas v. Upjohn, 926 F.2d 1019 (11th Cir. 1991), cert. granted, vacated and remanded, Papas v. Zoecon Corp., 112 S.Ct. 3020 (1992) 5

Shaw v. Dow Brands, 994 F.2d 364 (7th Cir. 1993) 6

Taylor v. Pure Gro, ___ F.3d ___ (9th Cir., June 1995) 5

Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991) 6

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 5

CONSTITUTIONAL PROVISIONS:

Article VI, cl. 2 ..... 2, 7

The Fifth Amendment 2

STATUTES AND REGULATIONS:

7 U.S.C. § 136 et seq. 2

7 U.S.C. § 136v(b) 3, 5

No. 94-2061

In The

Supreme Court of the United States

October Term, 1995

GARY W. JENKINS,

Petitioner,

v.

AMCHEM PRODUCTS, INC., UNION CARBIDE AGRICULTURAL PRODUCTS CO., RHÔNE-POULENC AG COMPANY, PLATTE CHEMICAL COMPANY, and FARMLAND INDUSTRIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondents, Amchem Products, Inc., Union Carbide Agricultural Products Co., Rhone Poulenc Ag Company, Platte Chemical Company and Farmland Industries, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, Gary W. Jenkins.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, cl. 2 provides:

> "The Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militias, when in actual service in time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner complained against the respondents, all either manufacturers, formulators, or distributors of pesticide products, that his use of chlorophenoxy herbicides either caused or was a substantial factor in causing his non-Hodgkins lymphoma. Chlorophenoxy herbicides, the most well-known of which is 2,4-D, are pesticides which are subject to regulation under the provisions of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA"), 7 U.S.C. § 136 *et seq.*

Respondents' products are registered under the provisions of FIFRA.

Petitioner asserted theories of recovery of negligence, failure to test, failure to warn, and strict liability. (AppB. p.29)[1] The trial court granted summary judgment to respondents on petitioner's failure to warn theories under both negligence and strict liability on the grounds that such claims were pre-empted by Section 24(b) of FIFRA, 7 U.S.C. § 136v(b). (AppB. p.6) Petitioner voluntarily dismissed his claims for manufacturing and design defect based on negligence and failure to adequately test the product. (AppB. p.6) The trial court determined petitioner's remaining strict liability claim was also essentially based upon a failure to warn and granted summary judgment on that claim also. The Kansas Supreme Court upheld the trial court's ruling that Section 24 of FIFRA pre-empts state court tort actions based upon a failure to warn. (AppB. p.19) The Kansas Supreme Court affirmed, on grounds different from the trial court, the dismissal of petitioner's strict liability design defect claims upon state law grounds which are not the subject of the petition for certiorari. (Petition at 4) The Court also rejected petitioner's claim that pre-emption of such claims interferes with a liberty interest under the Fifth Amendment (AppB. pp.29-30) and found no requirement that Congress provide an alternative remedy. (AppB. p.32)

---

[1] Appendix References are to the Appendix filed with the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Kansas Supreme Court correctly decided that petitioner's state common law failure to warn claims were pre-empted and no reason appears why this Court should grant discretionary review.

Operation of the Supremacy Clause does not infringe any due process liberty interest of petitioner nor, under the decisions of this Court, must an alternative remedy be provided when pre-emption occurs.

REASONS FOR DENYING THE WRIT

I. THE ISSUE PRESENTED BY THE KANSAS SUPREME COURT'S PREEMPTION DECISION IS NOT OF THE CHARACTER FOR WHICH DISCRETIONARY REVIEW SHOULD BE GRANTED

This Court's Rule 10 indicates the character of the reasons that will be considered in the exercise of the Court's discretion on a Petition for Certiorari. The decision of the Kansas Supreme Court does not fit within any of the applicable criteria.

The Court's decision is not in conflict with the pre-emption decisions of the United States Courts of Appeals and state courts of last resort that have addressed the subject of FIFRA pre-emption subsequent to this Court's decisions in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) and *Gade v. National Solid Waste Management Ass'n*, 112 S.Ct. 2374 (1992).

After the decisions in *Cipollone* and *Gade*, this Court granted certiorari and remanded decisions of two U.S.

Courts of Appeals which had determined 7 U.S.C. § 136v(b) pre-empted state law failure to warn claims. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *cert. granted, vacated and remanded*, 113 S.Ct. 314 (1992); *Papas v. Upjohn*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted, vacated and remanded, Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992). Both of these courts upon remand determined, applying *Cipollone*, that 7 U.S.C. § 136v(b) pre-empted state law failure to warn claims. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S.Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S.Ct. 60 (1993). This Court found both decisions unworthy of discretionary review, and this case is identical to those in its holding. Nothing makes this case more worthy of discretionary review than those cases.

To the contrary, it is now even clearer that there is no need for this Court to review the issues presented in the petition, because there is no indication that any conflict in decisions is likely to arise. Six more Courts of Appeals have since *Cipollone* addressed this precise question and have, without any suggestion of a conflict in their decisions, determined that pre-emption applies. *Taylor v. Pure Gro*, ___ F.3d ___ (9th Cir., June 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. DuPont de Nemours Co.*, 996 F.2d 1346 (1st Cir.), *cert.*

dismissed, 114 S.Ct. 490 (1993); *Shaw v. Dow Brands*, 994 F.2d 364 (7th Cir. 1993).[2]

In addition to this case, the other state court of last resort to decide the question since *Cipollone* has found pre-emption to apply. *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S.Ct. 1944 (1993).

Nor does the decision of the Kansas Supreme Court conflict with applicable decisions of this Court. The only decision by this Court to have addressed the pre-emptive scope of FIFRA is *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991). While the Court found that state regulation of pesticide *use* was not pre-empted, it contrasted this conclusion with withholding of state authority to regulate pesticide labeling:

> [L]ocal use permit regulations – *unlike labeling* or certification – do not fall within an area that FIFRA's "program" pre-empts . . .

Mortier, 111 S.Ct. at 2486-87 (emphasis added). Labeling is the precise issue addressed by the Kansas Supreme Court here, and the court's pre-emption holding is consistent with this Court's decision in *Mortier*.

---

[2] In a pre-*Cipollone* case, *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984), the D.C. Circuit concluded that FIFRA did not pre-empt state common law tort suits for failure to warn. In addition to being pre-*Cipollone*, the "choice of reaction" analysis employed by that Court has been discredited by this Court's decision in *International Paper v. Ouellette*, 479 U.S. 481 (1987), and rejected by all the United States Courts of Appeals to subsequently consider the question.

II. REVIEW OF PETITIONER'S DUE PROCESS ARGUMENT SHOULD NOT BE GRANTED, BECAUSE THE KANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH SETTLED LAW AND PETITIONER'S ARGUMENT LACKS MERIT ON ITS FACE

Pre-emption is a mandate of the Supremacy Clause of the United States Constitution, Article VI, cl. 2. Its very purpose, and hence its effect, is to displace state law or state law concepts. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625-26 (1st Cir. 1987). Petitioner's argument (Petition at 16-19) that FIFRA pre-emption violates his due process liberty interest because it pre-empts a state common law remedy would emasculate the Supremacy Clause. That argument is inconsistent with the decisions by this Court holding that pre-emption may operate to leave a person without a common law remedy. *Cipollone, supra* (common law failure to warn claims pre-empted); *Arkansas Louisiana Gas & Co. v. Hall*, 453 U.S. 571, 584 (1981):

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed.

Petitioner seizes upon one sentence of *dictum* in *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1978), where the Court stated:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.

(Petition at 14). From this he argues that this Court should accept review of the Kansas Supreme Court's holding that "there is no requirement under the United States Constitution that an alternate cause of action be established." *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869, 886 (1994) (AppB. p.32).

However, the decision of the Kansas Supreme Court is in accord with the decisions of this Court, including *Duke Power*. As this Court stated in *Duke Power*, 438 U.S. at 88 n. 32:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common-law." (Citations omitted.) The "Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object." (Citation omitted.), despite the fact that "otherwise settled expectations may be upset thereby." (Citations omitted.) Indeed, statutes limiting liability are relatively commonplace and have *consistently* been enforced by the courts. (Citations omitted.)

Indeed, if petitioner's argument were correct, the states would hold the federal government in thrall, because Congress could never displace state law in order to promote federal purposes and policies without providing substitute remedies consistent with each state's wishes. State law, not federal law, would be supreme.

Finally, the issue on which petitioner seeks review is not even squarely presented by this case. Petitioner has not been deprived of all potential state law remedies by application of pre-emption to his failure to warn theories.

While he asserts in the Petition (Petition at 19-22) that the existence of other state law claims is a fiction, it was petitioner himself who asserted such other theories of recovery in his Complaint and in the pretrial order. As found by the Kansas Supreme Court:

> Plaintiff's inability to prove a cause of action is not equivalent to that cause of action being pre-empted. Plaintiff initially asserted theories of negligence, failure to test, failure to warn, and strict liability. It is only negligent failure to warn and strict liability failure to warn claims which are preempted by FIFRA. Plaintiff still has viable causes of action to remedy the harm he allegedly suffered by defendants' products even though one theory of liability is preempted. The fact that plaintiff is unable to meet his burden on other theories is a result of plaintiff's lack of proof rather than a result of preemption.

Jenkins v. Amchem Products, Inc., supra; (AppB. pp.28-29).

Petitioner has not been deprived of any constitutionally protected liberty interest. There is no requirement that Congress provide an alternative remedy for petitioner's pre-empted theories of recovery. And petitioner has shown no special or important interests that would call for this Court to exercise its discretion to grant his petition.

CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN W. JACOBSON
(Counsel of Record)
4400 N. Mulberry Drive
Kansas City, Missouri 64116
(816) 587-0330

DONALD W. BOSTWICK
MONTE VINES
ADAMS, JONES, ROBINSON & MALONE
600 Market Center
155 North Market
Wichita, Kansas 67201
(316) 265-8591

Attorneys for Respondents